

# CONDEMNATION:

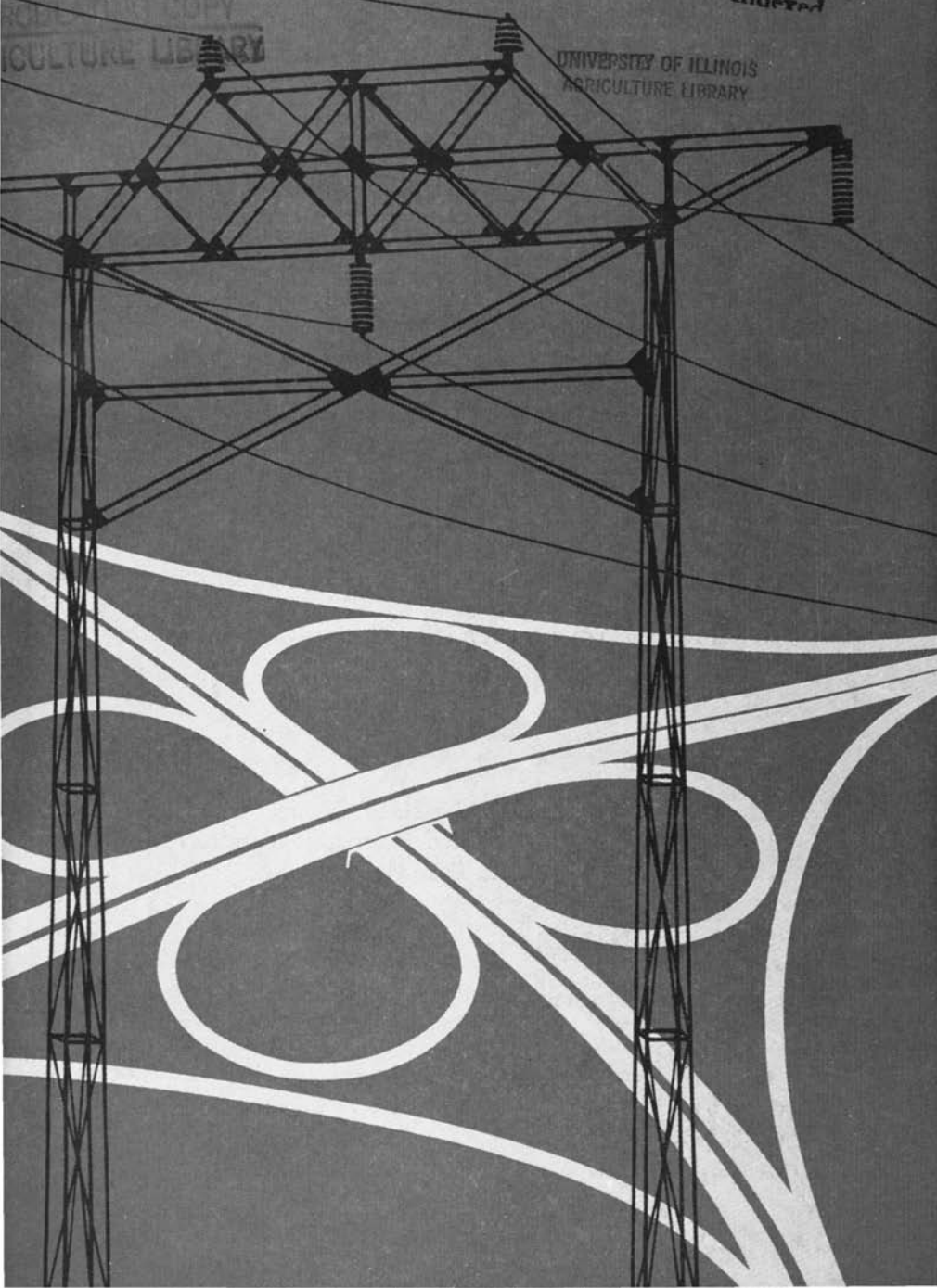
THE PUBLIC TAKING OF ILLINOIS FARM LAND

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*Revised and Reissued*

This circular was prepared by H. W. Hannah and N. G. P. Krausz, Professors of Agricultural Law. It replaces Circular 717 "Compensation for Illinois Farm Land Taken by the Public."

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## CONDEMNATION —

### The Public Taking of Illinois Farm Land

**M**OST OF US ARE NOT FAMILIAR with the way in which the public obtains the rights it needs in private property. When the state or a power company, for example, makes an offer to a farmer for rights to his land, he is likely to be confused and uncertain as to what he should do. He may wonder: Are they offering me enough money? Does the township really need my land for a school? Do I have to sell the light company a right of way? Can I persuade the agency to look somewhere else and leave me alone?

This circular is intended to help answer these and similar questions in the light of Illinois statutes and court decisions bearing on the subject. It is not meant as a substitute for legal counsel. In fact, the more an owner knows of his rights and the rights of the public in any taking of land, the more likely he is to realize that he needs an attorney's advice in the transaction.

#### Why has the public the right to take private property?

The agencies by which we are governed and served must have room in which to operate. A state without grounds for a state house, a county without a public square for the courthouse, or a power company with no path across the country for its towers and lines would be sorry spectacles. A government cannot exist without the right to take such land as it needs, known as the right of eminent domain,<sup>1</sup> any more than it can exist without the right to defend itself.

As with all so-called "inherent" powers of government, however, when the right of eminent domain is extended beyond what people have learned to accept or consider obvious, they question the fairness of the demand. Problems and controversies then arise which often must be settled in court.

#### What limitations are placed on the right of the public?

In general the power of eminent domain is a fundamental power of governments that may be delegated to subdivisions and agencies of these governments. For example, a county as part of the state government has been delegated the legal right to improve highways and

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<sup>1</sup> The exercise of the right of eminent domain by legal action in the circuit court is generally referred to as "condemnation" or a "condemnation suit."

can take any private property needed in straightening or widening old highways or in building new ones. But when taking such property, the county (or any other public agency) is held in check by two very important limitations: It can take only those rights to private property that it needs and, according to both the federal and the Illinois constitutions, must pay just compensation for any property taken. The Illinois law also requires compensation for property damaged but not taken.

The right of public utilities to acquire private property in Illinois is limited by the Illinois Commerce Commission. A power, telephone, telegraph, gas, gas-storage, pipeline, water, or railroad company wishing to expand or change its service must first get a permit from the Commission. Before deciding whether to grant the permit, the Commission checks any proposal to obtain land to extend lines, pipes, or other facilities. The Commission must usually approve the route the company plans to take before any extension may be made. In the acquisition of gas-storage rights the Commission must determine that the taking will not involve substantial mineral deposits or valuable water resources.

## **Who has the right of eminent domain in Illinois?**

In Illinois those who may obtain private property through use of the eminent-domain procedure are:

The federal government or any of its agencies.

The government of Illinois or any of its agencies.

Political subdivisions of the state (counties and townships).

Municipalities.

Public corporations (school districts, drainage districts, fire-protection districts, and others).

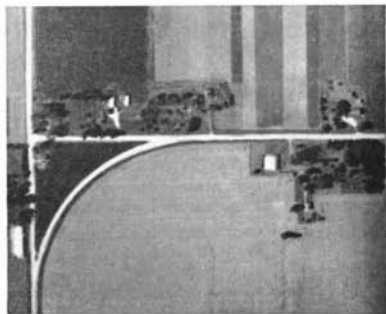
Public utilities, public-service corporations, or quasi-public corporations (power, light, gas, gas-storage, electric, telephone, telegraph, water, or pipeline companies).

Any agency to which the right may have been given by the legislature (the Illinois Toll Highway Commission, for example).

Private corporations and individuals do not have the power of eminent domain, though sometimes a right of necessity may be granted to one individual in the land of another (a necessary road or drainage outlet, for example).

## **When is the right of eminent domain exercised?**

Agencies needing rights in private property first try to get them through agreement with the owner. If the owner is willing to donate



The airview on the left shows a right-angle intersection on a highway. That on the right shows the same intersection after the right angle on the main highway was replaced by a circular curve. To make this improvement possible, several acres of farm land were taken for public use.

the right, or will accept what is offered and transfer the right, nothing needs to be done beyond completing the formalities of transfer. If the owner refuses to convey the right, the agency may begin an eminent-domain proceeding. Also, when an owner is for some reason not able to consent, is not a resident of the state, or his name or residence is unknown, eminent domain may be used.

## Where are proceedings conducted?

An eminent-domain proceeding is a suit at law and must be conducted in a court. If the federal government is involved, the suit is conducted in a Federal District Court; otherwise the suit is in the circuit court of the county in which all or part of the property is located.

## What are the rights of the property owner?

The purpose of the eminent-domain procedure is to make sure that the property owner is fairly treated and that the public gets the rights it needs. An owner may bring in evidence to establish the value of the property that is being taken and to show how much he will be damaged. A jury or judge hears the evidence and decides the amount of compensation the owner is to receive. The owner or the party bringing suit may ask the jury (if a jury is used) to go upon the property and examine it before making a decision. Appeals may be taken from the circuit court to the Supreme Court of Illinois and from the Federal District Court to the United States Circuit Court of Appeals.

In court the landowner may challenge the right of the petitioner to take his property by stating that it is not being taken for a public purpose. He does this by a motion to dismiss the suit. Then the petitioner must show that the property is needed and that it is for a public purpose. For example, condemnation of land for public use in the distant future or for "ancillary purposes" such as service drives along freeways has been the basis for some challenges to the right to take land.

## How is a proceeding conducted in Illinois courts?

**How proceedings are begun.** The agency wanting to take private property begins by filing a petition with the clerk of the circuit court. This petition must show the authority of the agency to take by eminent domain, the purpose for which the property is wanted, a description of the property, and the names of all known owners and other parties interested in the property. After the petition is filed, a summons is served on the defendant and notice of the hearing is published. The law requires that the hearing be set twenty days or more after the summons is served on the defendant or after the notice is published. The court may permit amendments of the petition and may bring in parties not named in the petition.

Any person not included as a party to an eminent-domain proceeding may become a party by filing a cross petition stating that he is an owner or has an interest in the property which will be taken. The court must then determine his rights and give them full consideration.

Under the Illinois law any number of separately owned tracts in the same county may be included in one petition. The compensation for each may be decided in the same or in different trials, or by the same or different juries (if a jury is used), as determined by the court.

**Appearance in court.** A statement that the agency has the right to take private property must appear on the face of the petition. If the owner wishes to challenge the right of the petitioner to take all or any portion of the land described in the petition, he must file a motion to dismiss. Then the court can hear evidence from both parties in determining whether the motion should be sustained. If the owner feels that the petition has not been properly filled out—if, for instance, the reason for taking his property is not stated or the description of it is inaccurate—he should file a demurrer. When he does this, he is not challenging the right to take his land; he is merely saying that the case has not been properly presented and the court cannot legally proceed.

**Defenses available to a landowner.** With the help of his attorney, a landowner may make the following moves to defend himself and his property:

1. Challenge the right to take his property.

2. Challenge the necessity of taking the land requested. This may be on the theory that more property is requested than is necessary. An owner will need clear and convincing proof to back up such a challenge, for the courts have given public agencies wide leeway in deciding how much land they need. For example, a strip of land one-half rod wide for a telegraph line and enough land to eliminate a right-angle turn in a highway have been held necessary and reasonable. It has also been held that the court has no constitutional right to modify the condemning authority's specifications in regard to points of limited highway access and the size of an underpass.

3. Challenge the sufficiency of the petition. As an example, the petition of a school board was not sufficient where the facts disclosed that no formal resolution regarding the taking of the land had been adopted.

4. Show that the petitioner did not try to reach an agreement with him on the price for the land and that therefore the petitioner has no right under the law to begin an eminent-domain proceeding. The petitioner cannot answer such an objection by saying that the owner did not ask for compensation because the law does not require an owner to make a claim to protect his constitutional rights. The courts have decided that a letter addressed to the owner offering a certain amount per acre is a sufficient effort to reach an agreement; that refusing such an offer or stating that he would not be able to answer within a week means that the owner has failed to agree; and that if an owner appears in court to contest the petition, he has waived the right to contest on the ground of failure to agree and must do so on some other ground. An owner has a right, however, to know with whom he is dealing and may disregard an offer from an agent who will not say for whom he is acting. A formal offer by the petitioner is not required in all cases. If an owner insists on his price, the condemnor may be justified in refusing to make an offer.

5. File a cross petition asking for damages to land not taken. When he files a cross petition, an owner is admitting that he and the petitioner could not agree, and that the petitioner is acting within his legal rights in exercising eminent domain.

6. Demand a jury. In cases where the State of Illinois is not the petitioner, both the landowner and the agency wanting his land have

the constitutional right to ask a jury to go upon the land and examine it. After seeing the land and hearing the proof offered by both parties, the jury will make a report to the court stating what compensation is fair. The impaneling of the jury, challenging, and other procedures are conducted as in other civil suits. In cases where the State of Illinois is the petitioner, the right of both parties to ask for a jury trial is granted by statute.

**Costs, expenses, and fees.** Usually the petitioner pays the costs of an eminent-domain proceeding, but the landowner pays his own attorney's fees. However, if the petitioner gives up the proceedings, or does not pay the owner within the time specified in the judgment, the petitioner must pay the owner's costs, expenses, and attorney's fees. An owner is also entitled to payment for damages he suffers because of the petitioner's delay.

**Interest.** Interest on an award is payable from the time the judgment is given until the award is paid, but ordinarily if the owner has accepted the principal sum without interest, he cannot ask for interest. There are some exceptions: If the petitioner has refused to pay interest with the principal, for example, or has agreed to pay it later, the owner may expect interest even though he has already accepted the principal sum.

**Taxes.** A landowner is entitled to a proration of property taxes due from the time the land is transferred to a tax-exempt status when the condemnor takes possession of the property, or deposits or pays the award.

**Appeals.** If the landowner or the petitioner is not satisfied with the decision of the circuit court, either party may appeal directly to the Supreme Court. When a petition includes several owners, each owner is entitled to a separate appeal. An appeal may be based on alleged errors of the court or on alleged inadequate compensation. An award will not be changed unless the Supreme Court feels that the jury acted without considering the evidence or that the lower court allowed substantial error to creep in. When the evidence is conflicting, the Supreme Court prefers to rely on the judgment of the jury that heard the case.

**General.** An owner cannot have a condemnation proceeding dismissed on the ground that the agency has no money with which to pay for the property; if he does not receive his money after the judgment is rendered, he has adequate remedies under the law. The courts have also decided that a condemnation proceeding is not the place to



try title to land. If the title is not clear, the money may be paid to the county treasurer and held until it has been cleared. The eminent-domain proceeding can still be completed and the petitioner can take possession.

An owner is entitled to payment in legal tender and does not have to accept bonds or any form of substitute.

## When must an owner yield possession?

The general rule in Illinois is that the owner does not have to give up his property until he has been paid. There are some exceptions to this rule. If the case is appealed by the owner, the petitioner may give bond guaranteeing payment and take possession. Also if the owner is not known, or for some reason cannot receive payment, the amount may be paid to the county treasurer, and the petitioner may take the property.

In certain cases both the state and federal government have statutory authority to take possession of property before the condemnation proceeding is concluded. Such statutes are known as "quick-take" laws.

The federal law is used to acquire property for military purposes or for defense highways. The quick-take law adopted in Illinois in 1957 is designed for the use of the state in highway-land acquisition cases.

The Illinois law provides a method of awarding possession to the state after a preliminary finding of just compensation by the court. This preliminary finding is made at a hearing held within five days after the state files a motion requesting that it immediately be vested with such ownership in land as it needs to carry on its project. The state may take possession only after depositing with the court an amount of money equal to the preliminary estimate of just compensation (as determined by the court) plus one-fourth. The court may hear evidence of value and may also appoint three disinterested appraisers in arriving at its preliminary estimate of just compensation. The property owner is entitled to withdraw his share from the court after a hearing to determine the propriety of such withdrawal. A formal determination of just compensation is made at a later date, but evidence of the preliminary estimate may not be introduced. The owner may be entitled to receive 6 percent interest on portions of his final award.

For example, if the preliminary estimate is \$10,000 and the state deposits \$12,500 with the court, the owner may withdraw \$10,000

before final determination of just compensation. If the final award is \$15,000, the owner is entitled to interest on \$2,500.

If a petitioner tries to take possession before he has a legal right, an owner can take legal action to stop the entry.

## For what must compensation be paid?

Broadly speaking, an owner is not entitled to compensation simply because his use of the property is curtailed by laws or regulations. For example, a zoning law may restrict the type of structure which an owner may build on his land. A railroad may be required to fence its right of way. Dumping garbage into a stream may be declared a public nuisance. None of these restrictions are a taking of property within the meaning of the constitutional guarantee. Also destroying property in an emergency — to prevent the spread of fire, for example — may be justified.

Owners do have legal remedies for unauthorized or unreasonable regulations under the police power or for unwarranted destruction under the guise of an emergency.

Before an owner is entitled to compensation, some possessory interest in his property must have passed to the agency involved. The courts have held that the term "private property" as used in the constitution and the eminent-domain act includes both real and personal property and also the right of using and enjoying property.

A landowner must be paid, the courts have ruled, for the loss of any of these property interests:

Land and permanent improvements, including fences, drainage systems, orchards, crops, woodlands, and structures.

Riparian rights, at least in Illinois courts (where a stream channel is altered, for example).

Trees and shrubbery, springs and wells, minerals, underground waters.

Natural drainage rights (if natural drainage is altered, damages may be due the landowner).

Right of access to an existing highway.

Easements (a right of way across the condemned land, for example). Covenants and contractual rights are not compensable — there must be an interest in the land itself.

An additional use of a right previously acquired by the public (for example, erecting a telephone pole on a right of way previously acquired for use as a highway).

Land made useless by public improvements that cast large amounts of water, earth, sand, or other materials on it. For example, permanent flooding would result in a loss of a property interest.

## To whom must compensation be paid?

Those who own all or some of the rights taken are entitled to payment. According to the courts, compensation must be paid to:

Fee-simple owners holding the whole interest in the property.

Joint owners, whether tenants in common (as heirs generally are) or joint tenants with the right of survivorship (usually husband and wife).

Trustees and the beneficiaries of trusts.

Life tenants.

Remaindermen and reversioners (those who own the fee during the time possession is held by a life tenant).

The grantees of property conveyed during condemnation proceedings.

Mortgagees. The award is a substitute for the property taken and the mortgage creates an equitable lien against the award. However, failure to make the mortgagee a party does not entitle the mortgagor to have the proceedings dismissed.

Guardians and conservators and those they represent.

Receivers and those holding rights of redemption.

Holders of tax titles.

Tenants. A farmer who leases land from another is entitled to the value of his lease or estate in the land for as long as he has leased it, whether or not he has a written agreement. He is not entitled to any compensation if his term is up before his possession is disturbed. If the whole property is not affected, he is paid only for the portion of his interest that is taken. The condemnor is not required to make a separate payment for permanent improvements made by a tenant; the tenant and landlord must agree on the amount to be allowed the tenant — if any — out of the award. A tenant, however, has a right to intervene in an eminent-domain suit and present evidence of his damages.

It is well established that every person with an interest, whether partial, temporary, permanent, or absolute, has a right to damages in proportion to the injury his interest has received. Also the condemning agency cannot be made to pay more than would be necessary if one person had a complete and perfect title to the property. This is sometimes called the unit rule, meaning that the property must be evaluated as a whole.

## When may an owner be compensated for property not taken?

The theory of compensation when private property is taken by the public is that the owner shall be left "whole" or in as good a position as he was before his property was taken. Often he must be paid for something in addition to the value of the property actually taken. This

additional payment is called compensation for damage to property not taken. In order to receive compensation for property damaged but not taken, the damaged property must be closely associated with the property taken. For example, land must be physically joined or be inseparably connected in use with the land taken.

Benefits such as an improved road also are to be considered and if they equal damages, the owner does not receive any compensation. If there is no damage beyond the loss of property, there is, of course, no additional compensation.

Damage to property not taken is generally measured by its depreciation in value. For example, when a drainage district takes land to widen a ditch and places the excavated earth on the banks, the property owner is entitled to one recovery — the difference in cash value of his farm before and after the improvement. If it is worth as much as it was originally, there are no damages. However, all past, present, and future damages which may reasonably be attributed to the improvement may be considered by the jury. Expert testimony may be brought in when needed (to render an opinion on danger from power lines, for example). The burden of proving damage to land not taken is on the landowner.

Some of the items that may depreciate the fair market value of property not taken, and for which the courts have allowed the owner damages, are:

Power, telephone, or telegraph lines running over a strip of land. (The only property taken is that necessary for poles or towers.)

Gas or pipe lines running through a strip of land. (The surface is not taken, but the owner's use may be affected.)

Lines damaging trees.

Cutting land off from water supply.

Shrinkage in farming area. This is sometimes called "severance damage," and is regarded by some as an exception to the rule that "consequential" damages cannot be allowed.

Division of farming area, or change in shape of the area.

Obstruction of drainage when a road is built, forcing water onto one's land.

Changes in the grade of a road, affecting access to property.

Removal of lateral support.

Cost of new fencing, resulting from a new road or drainage works.

Necessary cost of moving buildings.

Weeds and insects around the base of towers.

Damage to crops and livestock.

Loss of time in plowing, cultivating, and reaping.

Inconvenience, danger, and depreciation in value of land not taken

when it is necessary to drive livestock back and forth across a highway. (The danger of loss must be clear and the evidence specific.)

Damage to business and income.

Any special damages that an owner can prove and that most other owners may not have. (Increase in insurance rates, for example.) By the same token "special benefits" are also to be considered and weighed against damages.

## What damages cannot be compensated?

There are some damages and inconveniences for which the courts have refused to allow compensation. These are known as "consequential" damages. Some of them are:

The vacating of a road by the public (special damage must be shown).

Damages caused by the taking of adjoining property belonging to another. (If damages actually result, there are legal remedies outside the eminent-domain act.)

"Mere conjecture, speculation, fancy, or imagination" (damage must be real).

Fear of danger from a power line.

Danger of fire or explosion of gas line not located near buildings or on land not suitable for residential use.

Remote possibility that there will be trespass, danger, a need for fencing, or other inconveniences.

Possibility of having undesirable callers due to the nearness of a highway.

Possible difficulty of settling future claims.

Future loss of profits.

Possible loss of good will.

Loss of aesthetic or sentimental value (removal of trees or shrubs).

Unsightliness of poles and lines.

Dust, fumes, noise, traffic, and annoyance from a highway or railroad.

Loss of business during the progress of work.

Necessity of more costly fencing around towers.

Danger to owner or his family in crossing a highway.

When the owner conveys his land by deed as a result of agreement with the public agency it is assumed that the purchase price includes damage to land not taken. He cannot, therefore, claim a separate allowance for such damages.

## How can value be established?

The courts have agreed that "just compensation" means the full and perfect equivalent in money of the property taken. The owner

is to be placed in as good position financially as though his property had not been taken. Values are to be set as of the time the petition is filed. About establishing the value of land, the courts have said:

The fair cash market value is the test. This is frequently defined as the amount a willing buyer will pay a willing seller.

The value of the land for the highest, best, and most profitable use to which it could be put, either now or later, may be shown.

Special value to the owner is admissible, but with limitations.

Rental value is an important test but not the only one.

Buildings, minerals, and timber are to be considered, though the land must be valued as a whole. Improvements not permanently "affixed" so they become a part of the real estate are not to be considered.

Sales of similar property may be introduced as evidence of value, but such questions as the degree of similarity and whether the time and place of sale would affect the similarity must be considered by the trial judge. For example, the courts have excluded evidence of sales made several years earlier.

Expert testimony on value may be admitted, such as that of a soil scientist or professional farm manager. The jury decides whether the witnesses are trustworthy judges of value.

Bona fide offers to purchase for cash by parties able to buy are some evidence of value, but must be carefully examined. Offers made for similar property are not, in general, admitted as evidence. Neither is the amount paid in other eminent-domain proceedings. Offers previously made by the condemning party also cannot be brought in as evidence of value.

Profits or expected profits are not good evidence of value unless the property is designed for such a special use that its value cannot be determined in any other way. A tract of farm land may be shown to have added value because it is part of a larger unit. Also testimony that the highest and best use of the property is for residential purposes may be admitted.

Evidence of crop yields may be admitted.

Reproduction costs, photographs, and other testimony which would add nothing to more acceptable evidence of value may not be admitted.

The value placed on property by the assessor is immaterial.

Compensation cannot be reduced by deducting taxes which will fall due after the petition is filed.

When the jury examines the property by going on the premises, it couples its own judgment of value with all the testimony received before arriving at a determination. This may include evidence to show the condition of land throughout the year, regardless of the condition at the time the jury viewed it.

The jury's determination will not be disturbed on appeal if its findings are "within the range of testimony." For example, a verdict

of \$17,125 was considered fair where the testimony ranged from \$12,500 to \$38,000.

## **What rights do owners retain?**

When the public acquires farm land, it may take either the fee or title interest or an easement giving it the needed rights. When the complete interest is taken, as is usually the case when land is taken for highways, the owner has no further rights in the property except as a member of the public or perhaps as an adjoining owner. But when the agency takes only an easement, the owner may use the property in any manner not interfering with the public use. He may, for example, farm the land under which pipes are laid or over which lines are placed.

If only an easement is taken for highway purposes, he may use the untraveled part of the road. Such use may be limited by highway authorities to the extent necessary to insure the safety of users and to maintain the highway. Likewise, the owner of the fee may use a railroad right of way for any use that does not interfere with that of the railroad. A farm owner may pasture his animals along a drainage ditch or use water from the ditch, so long as the banks are not injured or the flow of water obstructed.

Where land is taken for today's modern highways, the owner retains very few rights. For example, he probably will not have the right of immediate access and he may be prevented from crossing the highway with machinery and livestock.

An owner is entitled to damages to the fee interest, except for damages arising naturally or reasonably expected to arise out of the use of the public easement. When a public easement is abandoned, the owner of the fee or his successors are entitled to possession, unless the right has been "cut off" by a statute of limitations.

## **How can an owner prevent an unauthorized use?**

The Illinois courts consider it a violation of a property owner's rights when his property is taken for a public use and he is forced to begin action at his own expense. If an agency goes ahead as though it had the right to make a particular use of a man's land but has not yet acquired that right, the owner is entitled to damages and to an injunction preventing further use until the right is legally acquired and fair compensation paid. This situation is most likely to arise when the agency has an easement and makes some additional or extended use involving other land of the owner. For example, the courts have held

that when a drainage ditch is widened and the spoil materials deposited on the edge, the landowner is entitled to an assessment of damages by a jury. Continuous flooding of land by a highway is another example.

There are situations, however, in which the public may acquire a permanent right to the use of property which has already been used for public purposes over a long time. For example, after a highway has been used for the statutory period of 15 years, the owner cannot get compensation.

Damage that occurs again and again, such as that caused to crops by a dam, may be recovered in an action for that damage. However, if the land is rented, such an action may be begun only by the tenant. The owner may sue for any damage to parts of his property that are certain to revert to him, such as fences, tile lines, buildings, grass waterways, or the soil itself.

## WHEN THE PUBLIC WANTS YOUR LAND

**Consider carefully the offer you receive.** It's likely to be a fair one. You may do better through agreement than through eminent-domain proceedings but make certain you are thoroughly informed before making any decision.

**Try to negotiate for a better settlement** if you honestly feel that a fair price has not been offered. Before deciding, take into account all the damages involved.

**Engage an attorney immediately** if your efforts at negotiating fail. Then when your case comes to trial, you can present the best evidence possible to establish the true value of your rights.